

IN THE COURT OF APPEALS OF TENNESSEE

IN RE: RIKKI JACQUELINE FRY)	C/A NO. 03A01-9507-JV-00246
)	HAMBLEN COUNTY JUVENILE COURT
)	
)	
RICKEY ALLEN FRY,)	
)	
Plaintiff-Appellee.)	
)	HONORABLE THOMAS R. BEIERSON, Clerk
)	JUDGE, By Interchange
)	
v.)	
)	
)	
JANE ANN CERMOLA,)	
)	APPEAL DISMISSED
Defendant-Appellant.)	REMANDED

<p>FILED</p> <p>January 29, 1996</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>

DOUGLAS R. BEIER of EVANS & BEIER, Morristown, for Appellant
 ETHEL P. LAWS, Morristown, for Appellee

O P I N I O N

Susano, J.

The Hamblen County Juvenile Court awarded the custody of Rikki Jacqueline Fry, a minor, to her father, Ricky Allen Fry. The trial court's order modified an earlier custody decree of the same court.¹ The child's mother, Jane Ann Cermola, appeals, challenging the correctness of the trial court's order. The appellee contends that we do not have jurisdiction of this appeal because, so the argument goes, the appellant did not file her notice of appeal in compliance with T.R.A.P. 3(e) and 4(a).

Facts

On February 27, 1995, Judge Thomas R. Frierson, II, Judge of the Hamblen County General Sessions Court², entered an order in this case transferring the custody of the parties' minor child to her father. The judgment reflects that Judge Frierson was sitting by interchange for the regular Juvenile Court Judge who had a conflict of some unspecified nature. All of the pleadings and orders in this case reflect that it was in the Hamblen County Juvenile Court. It is clear³ that this case was not transferred to the General Sessions Court, but rather was tried by the judge of that court sitting by interchange in the Juvenile Court.

¹This case is the outgrowth of a legitimation proceeding. The parties to the present appeal had earlier filed a joint petition to legitimate Rikki Jacqueline Fry as their natural child. By agreement, the child's custody was initially awarded to the child's mother, the appellee Jane Ann Cermola. The parties in this case never married.

²The Hamblen County General Sessions Court apparently has domestic relations jurisdiction.

³The appellant does not argue that this case was tried by the General Sessions Court.

The Juvenile Court and the clerk of that court are located in the Hamblen County Courthouse. The General Sessions Court and the clerk of that court are headquartered in the Justice Center, a building that is separate from the Hamblen County Courthouse. Apparently, Judge Frierson held some, if not all, of the hearings in this case in his courtroom at the Justice Center.

On February 22, 1995, following a hearing on February 10, 1995, Judge Frierson signed a memorandum opinion changing custody. On February 27, 1995, the appellant filed a "Motion to Stay Enforcement of Judgment Pending Appeal." That motion was filed by the appellant's counsel with the Juvenile Court Clerk, Wilburn Beck, at the Hamblen County Courthouse. Mr. Beck's signature and the date, February 27, 1995, are reflected on the face of the motion.

The motion to stay the judgment was argued before Judge Frierson on the day it was filed⁴. As with the earlier hearing on the merits, Judge Frierson's courtroom in the Justice Center was the site of the motion hearing. When the appellant's counsel came to the Justice Center on February 27, 1995, to argue his motion, he brought with him a notice of appeal. See Appendix to this opinion. Counsel handed the notice to Melanie Letterman, a deputy to the Clerk of the General Sessions Court. According to her testimony, she was not "a juvenile clerk in any shape, form or fashion." Ms. Letterman told counsel that she could not "mark

⁴The motion was filed the morning of February 27, 1995; the hearing was held that afternoon.

it filed." Instead she marked it "received," dated it, and put her initials, "M.L.," beside the date. She testified that she

. . . remember[ed] taking it back to Judge Frierson's office. I either laid it on his desk, or I put it in the file. I don't remember.

She also testified that she could not mark it as filed because "it wasn't . . . our case."

In explanation of his conduct, counsel for the appellant testified thusly:

. . . when I filed the motion to stay the judgment, the court file was still at the juvenile court office. When we came over that afternoon [February 27, 1995] for the hearing, the file was no longer there, so I brought the notice of appeal and the appellate [sic] bond over here [the Justice Center] to this Court to file at the hearing.

* * *

When I came to the court for the afternoon hearing, this Court already had the file. The file had been checked out of the Hamblen County Courthouse from the juvenile court and brought over to the justice center.

The appellant's counsel wanted the notice of appeal in the court file when he argued the motion, apparently to substantiate his intention to appeal Judge Frierson's change of custody order.

The appellee filed a motion below seeking to dismiss the appeal based upon an untimely filing of the notice of appeal. On June 16, 1995, Judge Frierson, again in his courtroom at the

Justice Center, held a hearing on the appellee's motion. The testimony recited earlier in this opinion was received at that hearing. Following the hearing, Judge Frierson signed an order denying the motion, finding that he lacked "jurisdiction to dismiss an appeal on the issue of failure to timely perfect [the] appeal." As previously indicated, the appellee has continued to pursue this issue on appeal.

Analysis

A resolution of the appellee's issue causes us to focus on the Rules of Appellate Procedure, specifically T.R.A.P. 4(a):

In an appeal as of right to the . . . Court of Appeals . . ., the notice of appeal required by Rule 3 shall be filed with and received by the clerk of the trial court within 30 days after the date of entry of the judgment appealed from; . . .

(Emphasis added). As pertinent here, the relevant provision of T.R.A.P. 3 is subsection (e):

An appeal as of right to the . . . Court of Appeals . . . shall be taken by timely filing a notice of appeal with the clerk of the trial court as provided in rule 4 . . .

(Emphasis added).

Judge Koch of this court has succinctly pointed out the significance of the notice of appeal requirement:

This time limit is mandatory and jurisdictional in civil cases. (footnote and citation omitted). The Tennessee Rules of Appellate Procedure specifically provide that this Court can neither waive [Tenn. R. App. P. 2] nor extend [Tenn. R. App. P. 21(b)] this time period. Thus, Tenn. R. App. P. 3(e) makes it clear that failure to file a timely notice of appeal is the only procedural omission that will affect the validity of an appeal. (footnote omitted). These procedural restrictions are sufficiently definite that the liberal construction provisions of Tenn. R. App. P. 1 should not be used to circumvent the plain intent of Tenn. R. App. P. 4(a). (citation omitted).

Jefferson v. Pneumo Services Corp., 699 S.W.2d 181, 184 (Tenn. App. 1985). We must determine if a notice of appeal was timely filed in this case pursuant to these rules and principles; because if it was not, we lack jurisdiction of this appeal.

The appellant argues that Tenn. R. Civ. P. 5.06 provides that "the judge may permit the papers to be filed with the judge"; that there are numerous papers in the court file that are not marked "filed"; and that the Supreme Court cases of **Rush v. Rush**, 97 Tenn. 279 (1896), and **Montgomery v. Buck**, 25 Tenn. 416 (1846), stand for the proposition that papers are considered filed when handed to the appropriate person even if not marked "filed."

Rule 5.06 is a part of the Rules of Civil Procedure. It pertains to "[t]he filing of pleadings and other papers with the court *as required by these rules . . .*" (Emphasis added). The words, "these rules," refer to the Rules of Civil Procedure. Rule 5.06 is not applicable to the requirements of the Rules of

Appellate Procedure. See Tenn. R. Civ. P. 1, Scope of Rules. We have found no provision in the Rules of Appellate Procedure similar to Tenn. R. Civ. P. 5.06.

The appellant focuses on, and attempts to minimize, the fact that the notice of appeal is not marked "filed." This misses the point. The deficiency in this case is not the failure of the notice of appeal to reflect the word "filed." The problem here is that the notice of appeal was not "filed with and received by" the Clerk of the Hamblen County Juvenile Court as required by T.R.A.P. 4(a). If the notice of appeal had been timely placed in the possession of the Clerk of the Hamblen County Juvenile Court, the failure to mark it "filed" might not be fatal. Cf. **City of Gatlinburg v. Corky Bell**, No. 03A01-9412-CV-00431, 1995 WL 114186 (Tenn. App. E.S. March 17, 1995). However, that is not what happened here. As far as we can tell from the record before us, the notice of appeal was not received by the Hamblen County Juvenile Court within 30 days of the entry of the judgment appealed from⁵.

The handing of a notice of appeal to the clerk of the court whose judge heard a case by interchange does not satisfy T.R.A.P. 4(a). The rule requires that it be received by the clerk of the court whose judgment is being appealed from--in this case, the Hamblen County Juvenile Court. Cf. **City of Red Boling Springs v. Whitley**, 777 S.W.2d 706 (Tenn. App. 1989)

⁵At the hearing on the appellee's motion to dismiss the appeal, appellee's counsel stated that the notice of appeal was filed with Mr. Beck on April 10, 1995; however, even this untimely filing is not documented in the record before us.

(holding that a requirement that an appeal bond be filed in the court from which the appeal was taken was not satisfied by timely filing the bond in the court to which the appeal was being pursued.)

In this case, the appellant did not seek to set aside the order of February 27, 1995, under Tenn. R. Civ. P. 60.02 predicated on an argument that she was guilty of "excusable neglect" in not timely filing her notice of appeal. See Advisory Commission Comment to T.R.A.P. 4; *Jefferson*, 699 S.W.2d at 184. However, even if such relief had been sought, it is unlikely that it would have been granted. Cf. *Jefferson*, at 185 ("The mere unilateral inadvertence or mistake of counsel is generally not considered to be 'excusable neglect.'"). See also *G. F. Plunk Const. v. Barrett Properties*, 640 S.W.2d 215 (Tenn. 1982).

We hold that the notice of appeal was not timely filed in this case⁶. It results that we do not have jurisdiction of this appeal.

This appeal is dismissed at the appellant's cost. This case is remanded to the trial court for the collection of costs assessed there, pursuant to applicable law.

Charles D. Susano, Jr., J.

⁶We do not reach the appellee's additional insistence that the notice of appeal was not timely served in this case. Cf. *G. F. Plunk Const. v. Barrett Properties*, 640 S.W.2d 215 (Tenn. 1982).

CONCUR:

Herschel P. Franks, J.

Don T. McMurray, J.